Supreme Court of the United States,

OCTOBER TERM, 1918.

No. 62.

G. S. NICHOLAS & CO., ET AL.,
Petitioners,

vs.

THE UNITED STATES.

BRIEF FOR PETITIONERS.

ALBERT H. WASHBURN,
Attorney and Counsel for Petitioners.

C. G. BURGOYNE PRINTING BUSINESS, 72-78 Spring St., New York.

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In the Supreme Court of the United States.

OCTOBER TERM, 1918.

G. S. NICHOLAS & CO., ET AL., Petitioners,

vs.

THE UNITED STATES.

No. 62.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS APPEALS.

BRIEF FOR THE PETITIONERS.

Statement of the Case.

This case is here on *certiorari* to a judgment of the United States Court of Customs Appeals rendered on May 12, 1916 (*Nicholas & Co., et al., vs. U. S.*, 7 Ct. Cust. Appls., 97).

The petition was filed under the Act of August 22, 1914 (38 U. S. Stat., 703), amending Section 195, Act of March 3, 1911 (36 U. S. Stat., 1087). Pursuant to said Act of 1914 the Attorney General (R., 53) on January 22, 1916, filed this certificate :

> " In pursuance of the Act entitled ' An Act to amend section 195 of the Act entitled ' An Act to codify, revive

(The references to the Record in this brief are to pages.)

and amend the laws relating to the judiciary, approved March 3, 1911',' approved August 22, 1914, I, T. W. Gregory, Attorney General of the United States, do certify that the case now pending and undecided in the Court of Customs Appeals, entitled 'No. 1594, G. S. Nicholas & Company, *et al.*, v. The United States,' is of such importance as to render expedient its review by the Supreme Court.

"Given under my hand this 22nd day of January, 1916.

T. W GREGORY,
Attorney General."

The British government has an excise system peculiar to itself with respect to spirits. An excise or internal revenue tax is not imposed upon spirits as such, *but only upon potable spirits when entering into domestic consumption.* The government officially recognizes that the special precautions taken by it to prevent such spirits escaping the duty results in the imposition upon the manufacturer of statutory restrictions in connection with his plant and method of manufacture which considerably enhance his natural costs of production (Exhibit 6, Annex A, R., 28).

To compensate the manufacturer, at least, in part for these extra expenses, which are no part of the normal cost of manufacture, and which the government for its own ends requires him to incur, the British government has for over half a century made an allowance under certain contingencies of so much per proof gallon upon plain and compounded spirits. At the present time these allowances amount to 3d. per gallon upon plain and 5d. per gallon upon compounded spirits. They are not alone made, as will hereafter appear, when spirits are destined for exportation; they are not limited to exported spirits, but they may or may not include such spirits.

The question presented for determination is: Does the British government pay or bestow directly or indirectly any

bounty or grant upon the exportation of spirits within the meaning of Section 4, Paragraph E, Tariff Act of October 3, 1913 (38 U. S. Stat., 114). Paragraph E provides as follows :

> " That whenever any country, dependency, colony, province, or other political subdivision of government shall pay or bestow, directly or indirectly, any bounty or grant upon the exportation of any article or merchandise from such country, dependency, colony, province, or other political subdivision of government, and such article or merchandise is dutiable under the provisions of this Act, then upon the importation of any such article or merchandise into the United States, whether the same shall be imported directly from the country of production or otherwise, and whether such article or merchandise is imported in the same condition as when exported from the country of production or has been changed in condition by re-manufacture or otherwise, there shall be levied and paid, in all such cases, in addition to the duties otherwise imposed by this Act, an additional duty equal to the net amount of such bounty or grant, however the same be paid or bestowed. The net amount of all such bounties or grants shall be from time to time ascertained, determined, and declared by the Secretary of the Treasury, who shall make all needful regulations for the identification of such articles and merchandise and for the assessment and collection of such additional duties."

The applicable laws of Great Britain are :

(a) August 28, 1860 (23 and 24 Vict. Cap. 129);
(b) Section 12 of Chapter 98 of 28 and 29 Vict. 1865 ;
(c) August 26, 1880 (43 and 44 Vict.), usually cited as the " Spirits Act of 1880 " ;
(d) Sections 16 and 17 of 44 and 45 Vict. Cap. 12, 1881 ;
(e) August 6, 1885 (48 and 49 Vict. Cap. 51) ;

(f) August 26, 1889 (52 and 53 Vict. Cap. 42), usually cited as the "Revenue Act of 1889";
(g) May 30, 1895 (58 Vict, Cap. 16);
(h) July 22, 1902 (2d Ed. VII., Cap. 7);
(i) August 4, 1906 (6th Ed. VII., Cap. 20).

Section IV. of the original Act of August 28, 1860, provided:

> "In consideration of the Loss and Hindrance caused by Excise Regulations in the Distillation and Rectification of Spirits in the United Kingdom, there shall be paid to any Distiller or proprietor of such Spirits on the Exportation thereof from a Duty-free Warehouse, or on depositing the same in a Customs Warehouse, on or after the Fifth Day of *March*, One thousand eight Hundred and sixty, the Allowance of Twopence *per* Gallon computed at Hydrometer Proof, and to any license Rectifier who on or after the said last-mentioned Day has or shall have deposited in a Customs Warehouse Spirits distilled and rectified in the United Kingdom the following Allowances: (that is to say) on rectified spirits of the Nature of *British* Compounds not exceeding Eleven Degrees over Proof as ascertained by *Syke's* Hydrometer an allowance of Three pence per Gallon, and on Spirits of the Nature of Spirits of Wine an Allowance of Twopence per Gallon, such Gallons being computed respectively at Hydrometer Proof" (23, 24 Vict. Cap., 129).

Mr. Gladstone announced in the House of Commons before this law was passed that he intended to propose a limited allowance "in consequence of the disadvantage under which the British distiller labored" (Hansard's Parliamentary Debates, 3rd Series, Volume 106, pages 1705–7).

By the Act of August 6, 1885, the allowance was fixed at 2d. on plain spirits and 4d. on compounded spirits. Section 3 provided:

> "3.—(1) Where any spirits distilled and rectified in the United Kingdom are exported from an Excise or

Customs warehouse, or are used in any such warehouse for fortifying wines, or for any other purpose to which foreign spirits may be applied, there shall be paid in respect of every gallon of such spirits, computed at hydrometer proof, the following allowances; that is to say:—

"In respect of plain British spirits, and spirits of the nature of spirits of wine, an allowance of twopence, and

"In respect of British compounded spirits, and allowance of fourpence."

The existing allowance of three pence on plain spirits and five pence on compounded spirits is made under Section 5 of the Act of July 22, 1902 (2d Ed. VII.). The collector took an additional or countervailing duty of three pence per British proof gallon on plain spirits and five pence on the compounded spirits upon the theory that the existing allowance under the Act of 1902 constitutes a bounty or grant within the meaning of Section 4, Paragraph E, Tariff Act of October 3, 1913 (R., 9). It appears from a statement made in 1911 by the British board of customs and excise that the rates of allowance fixed in 1902 were then in force (Exhibit 6, Annex D, R., 35). It further appears from Exhibit 8 (R., 43) that the British government certifies that there has been no change whatever since 1911 either in the amount or nature of the allowances made. See also statement of the United States consul at Edinburgh (Exhibit 7, R., 40).

The case was submitted to the board of United States general appraisers upon a stipulation (R., 14) consisting mainly of British laws and regulations, diplomatic communications containing official statements of the British contention, affidavits of British distillers, and despatches of the United States consul at Edinburgh.

The board overruled the protests of the importers and affirmed the action of the collector, T. D. 35595, G. A. 7758 (R., 16).

The court of customs appeals affirmed the decision of the board (R., 55).

The definition and significance attached to terms which will frequently recur in this brief will be found by referring to page 186 of Harper's Manual, 1914, one of the exhibits in this case (R., 15). Most of these definitions are taken from the "Spirits Act of 1880," 43rd and 44th Vict., Chap. 24, as appears from the decision of the court below (R., 57):

> "*Allowance.*—A payment granted for British spirits on being deposited in warehouse, used in warehouse, or exported, to compensate the distiller and rectifier for costs due to Excise Restrictions.
>
> "*Spirits.*—All spirits, whether British or foreign.
>
> "*British Spirits.*—Spirits liable to a duty of Excise.
>
> "*Plain Spirits.*—Such as are in their original state, having had no artificial flavour communicated to them.
>
> "*Compounded Spirits.*—Spirits prepared from duty-paid spirits by a rectifier or compounder, by re-distilling or adding any ingredient or flavouring to them."

ARGUMENT.

I. The construction contended for by the petitioners was followed in customs practice for many years, and the re-enactment by Congress without change of a statute, the long continued executive construction of which was expressly confirmed in 1911 after a prolonged investigation in a published decision by the department charged with the administration of the law, must be deemed an adoption by Congress of such construction.

This doctrine has been repeatedly invoked and approved by this Court.

Stuart vs. Laird, 1st Cranch, 299, 309.
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United States vs. Falk & Bro., 204 U. S., 143.
Copper Queen Consolidated Mining Co. vs. Arizona Board, 206 U. S., 474, 479.
United States vs. Cerecedo Hermanos y Compania, 209 U. S., 337.
United States vs. Midwest Oil Co., 236 U. S., 459, 469, 472.
Louisiana vs. Jack, 244 U. S., 397.

In *United States vs. Cerecedo Hermanos y Compania, supra*, the only question discussed in the opinion is the one of departmental practice, and it expressly appears that Mr. Justice WHITE and Mr. Justice PECKHAM concurred "solely because of the prior administrative construction."

In *United States vs. Midwest Oil Co., supra*, the question was as to the right of the President to withdraw public lands from private acquisition without special authorization by Congress after Congress had opened them to occupation. The Court said:

> "We need not consider whether as an original question the President could have withdrawn from

private acquisition what Congress had made free and open to occupation and purchase. The case can be determined on other grounds and in the light of the *legal consequences flowing from a long continued practice* to make orders like the one here involved."

U. S. vs. Midwest Oil Co., 236 U. S., 469.

* * * * * * *

"It may be argued that while these facts and rulings prove a usage, they do not establish its validity, but government is a practical affair, intended for practical men. Both officers, lawmakers and citizens naturally adjust themselves to any long continued action of the executive department—*on the presumption that unauthorized acts would not have been allowed to be so often repeated as to crystallize into a regular practice.* That presumption is not reasoning in a circle, but the basis of a wise and quieting rule that in determining the meaning of a statute or the existence of a power, *weight shall be given to the usage itself—even when the validity of the practice is the subject of investigation.*"

"This principle, recognized in every jurisdiction, was first applied by this court in the often cited case of *Stuart vs. Laird*, 1 Cranch, 299, 309."

Ibid, 472. (Italics ours.)

In *Brennan vs. United States* (C. C. A., 1st Circuit), 136 Fed. Rep., 743, the rule of long continued executive practice was held to be of the highest authority and *to master all others*, the court saying in the course of its opinion:

> "Wherever, in the history of customs laws, it is found that a certain expression has received, in effect, a statutory construction, or a long and uniform use by Congress or by the departments, that construction is controlling, unless some other is necessary."

In the instant case the British allowances here construed to be a bounty or grant date from 1860. As the opinion below points out (R., 69), Section 4, Paragraph E, Tariff Act of 1913

(38 Stat., 114) is a prototype of Section 5 of the Tariff Act of 1897 (30 Stat., 151), and was substantially re-enacted in Section 6 of the Act of 1909 (36 Stat., 11), and again in 1913 (38 Stat., 114). From 1897, then, there has been no attempt in actual practice *except in the instant case (Robertson vs. Downing*, 127 U. S., 613) to challenge this long continued departmental construction. The present case arises out of Treasury Decision 34466 of May 25, 1914. From 1897 down to 1914 then there was an uninterrupted departmental construction which was consistently adhered to in actual practice. It is true that this assertion does not agree with the position taken in the opinion below, which is evidently based upon a misconception. The court below (R., 69) reasons that " the departmental action negatives rather than supports the contention of appellants." It is said that from 1897 until April 18, 1911 (T. D. 31490) the section of the law here involved was construed as contended for by the petitioners. T. D. 31490 of April 18, 1911, sustained the contention of petitioners and the reference here is doubtless to T. D. 31229 of January 21, 1911, which did hold the British allowances to constitute a bounty under Section 6 of the Tariff Act of 1909. It was this ruling which was revoked *without having been actually followed in customs practice* by T. D. 31490 of April 18, 1911. The court then proceeds to point out that on May 25, 1914 (T. D. 34466), the department returned to its original ruling of January 21, 1911, and that " this *alternating practice* of approximately three years would not bring appellants within the rule of long continued and uniform departmental practice " (R., 69).

The facts are, as the record satisfactorily establishes, that T. D. 31229 of January 21, 1911, never became operative. By its terms it did not take effect until thirty days after date. Before the thirty days expired, to wit, on February 3, 1911, Ambassador Bryce in a memorandum to Secretary of State Knox urged very strongly, to use his

own language, that "the enforcement of the order should either be postponed indefinitely or to such a date as would permit" the production of satisfactory evidence "showing that this allowance does no more than cover the losses imposed on the industry by fiscal regulations imposed for revenue raising purposes (and) that such evidence be accepted as proof that these allowances do not come within the meaning of the term bounty in the proper sense of the word" (Ex. 5, R., 23, 25). It appears from the British Embassy despatch of March 17, 1911, to the Department of State that a postponement of one month was granted "which has been sufficient to permit the Embassy to obtain the required proof." Ambassador Bryce adds:

> "It may not, however, be enough to allow of the full and careful reconsideration of the question which its intrinsic international importance and its commercial equities requi.e. Unless, therefore, the new data now supplied is found to be so obviously conclusive that a decision can be come to before the date fixed for imposition of the countervailing duty on March 22d, I would strongly represent the propriety of a further postponement."
>
> Ex. 6, R., 27.

The United States Treasury memorandum reviewing the evidence submitted by the British government and reaching the conclusion, thus upholding the contention of that government, "that the allowance is a bona fide allowance as stated in the act of 1860, and is not in any sense an export bounty" is dated April 17, 1911 (R., 45). The formal Treasury decision (T. D. 31490) is dated the following day, April 18th. It recites:

> "Upon a further consideration of the laws of the United Kingdom of Great Britain and Ireland relating to the allowance granted upon exported British spirits, and in view of additional laws and facts in relation thereto submitted by officers of the said Government,

> the department has reached the conclusion that the said allowance is not a bounty or grant within the meaning of section 6 of the tariff act of August 5, 1909. Consequently no countervailing duty will be assessed upon British spirits imported into the United States. T. D. 31229 is hereby revoked."

It is manifest that the Treasury decision of January 21, 1911, was held in abeyance to enable the ruling to be reconsidered and that it was revoked on April 18, 1911, thus leaving the actual departmental practice undisturbed until the promulgation of T. D. 34466 of May 25, 1914, which became effective thirty days thereafter.

Even the Treasury ruling of May 25, 1914 lacks the support of the chief law officer of the Government, for it is therein stated that "the Attorney General has stated that the question of whether the said expert allowance are bounties within the meaning of Paragraph E of Section 4 of the Tariff Act of October 3, 1913, is one better fitted for judicial determination than for an expression of his opinion." Plainly, therefore, the court below was in error in supposing that there had been an "alternating practice of approximately three years" (R., 69). On the contrary it is clear that the departmental practice was "uniform" and that it was "long continued" (1897 to 1914).

The reenactment by Congress in 1913 without change of a statute which had previously received the long continued executive construction referred to in the United States Treasury memorandum of April 17, 1911, and confirmed on the following day in T. D. 31490, of which the law making body must be presumed to have taken due notice, is an adoption by Congress of such construction *(United States vs. Cerecedo Hermanos y Compania, supra)*.

The court below observes :

> "That this Government would be bound by the existence of a statute of Great Britain of which it pre-

> sumptively has taken and can take no notice even in its courts of record unless therein proven, is, in the opinion of this court without any force " (R., 69).

The meaning of this is not quite clear. By the very terms of Section 4, Paragraph E of the Tariff Act of 1913 the duty is cast upon the Secretary of the Treasury of ascertaining and declaring the net amounts of all bounties or grants paid or bestowed by any foreign country or other political subdivision of government, and he cannot perform this duty without taking notice of foreign statutes, just as he did in the instant case when he issued the regulations attached to T. D. 34466.

The prototype of Section 4, Paragraph E, Tariff Act of 1913, is found in Section 5, Tariff Act of July 24, 1897 (30 U. S. Stat., 151). Following the enactment of this law, prompt steps were taken to make it effective, as appears from Volume 48 of Consular Reports, H. R. 55th Congress, 2nd Session, Document No. 565. We quote the following, found at page 584 :

> " In view of the provision in the United States Tariff Act of July 24, 1897, for the assessment of additional duty upon imported merchandise which had received a bounty from the country of production a Department instruction was sent to consular and diplomatic offices in various foreign countries, requesting them to furnish information as to bounties granted by the several governments. The reports received (copies of which were sent to the Treasury Department) have been summarized as follows " :

Thereafter follow reports from twenty-eight countries, dependencies or colonies.

The action of Congress with respect to bounty legislation in 1897 was somewhat anticipated, as is shown by the following explanatory note taken from H. R. 55th Congress, 3rd Session, Document No. 285 :

> " The clause in the general deficiency bill of July 19, 1897, authorized the Department of State to print a

compilation of the tariffs of foreign countries and on July 22, 1897, the circular sent by the Acting Secretary of State, Mr. Adee, was mailed to the diplomatic representatives of the United States in foreign countries and consular officers resident in countries where there were no diplomatic representatives, instructing them to obtain with the least possible delay copies of the tariffs of the several countries, customs regulations and *bounty legislation relating to the export of domestic products* and transmit them to the Department as printed in the original official publications with accurate translations where the matter was printed in foreign languages."

During the succeeding twelve months subsequent to July 24, 1897, to go no further, the Treasury Department issued many instructions relating to bounties. See T. D. 18345 ; T. D. 18397 ; T. D. 18504 ; T. D. 18660 ; T. D. 18679 ; T. D. 18784 ; T. D. 19045 ; T. D. 19071 ; T. D. 19318 ; T. D. 19361 ; T. D. 19397 ; T. D. 19425. These instructions for the most part related to countervailing duties on imported sugars from different countries in Europe and South America, but not exclusively. Fish from France and from St. Pierre Miquelon, a French possession, were also covered.

Thereafter from time to time the Consular Reports disclose the activity of our consular officers abroad in reporting the payment of bounties.

See :

Volume 66, No. 248, page 163, iron and steel bounties in Canada ; page 586 on pig lead (56th Congress, 2nd Session).

Volume 69, No. 263, bounties on lead in British Columbia (57th Congress, 1st Session).

Volume 70, Nos. 264, 267, page 234, bounties on German metal exports ; page 538, bounty on sugar in France (57th Congress, 1st Session).

Volume 73, Nos. 276, 279, page 278, Canadian bounties on iron and steel (58th Congress, 2nd Session).

A review of the history of tariff legislation will satisfy

any student that in enacting the bounty provisions Congress aimed chiefly to reach bounty fed imported sugars. As observed in a memorandum of the British Embassy dated February 7, 1911 (R., 25), "the leading cases illustrative of the application of the section of United States tariff imposing countervailing duties are those of Dutch and Russian sugars —none of the very few other cases in which the section has been applied—such as fish from St. Pierre, Chilean wine, etc. —throw any additional light on its interpretation."

A perusal of the Consular Reports and Treasury Decisions above recited will disclose that the Treasury Department was kept informed by the United States representatives abroad of the existence of foreign statutes which had any bearing upon the bounty provisions of our tariff laws, and sugar was not the *only* commodity affected.

Indeed this record bristles with evidence that the instant case may be traced directly to our foreign consuls abroad. T. D. 31229 of January 21, 1911, subsequently revoked as we have seen by T. D. 31490 of April 18, 1911, was no doubt due to the despatches of March 23, 1910, and June 7, 1910, of our consul at Edinburgh; see also despatch of April 28, 1911 (Ex. 7, R., 40 and 41). On August 5, 1913, the consul returns to the charge, saying that:

> "this office has no information in regard to the grounds upon which the Treasury Decision of January 21, 1911, was reversed, but I deem it my duty to make further representations concerning this allowance on exported spirits." (R., 42).

The proof is ample that T. D. 34466 of May 25, 1914, is due to this revival of the matter by the Edinburgh consul (R., 44 and 50).

Furthermore, it appears from the consul's letter of March 23, 1910 (R., 40), that as early as December, 1904, anyway, the attention of the United States government was drawn to this matter, so any presumption that this government had no knowledge of the existence of a statute of Great Britain re-

lating to allowances on British spirits affirmatively disappears from this case with the close of the year 1904.

There is much in the facts in this case which suggests a striking parallel to the case of the *Copper Queen Consolidated Mining Company vs. Arizona Board*, 206 U. S., 474. There the question in issue had to do with the powers of a board of equalization based upon a statute of Arizona said to have been taken almost verbatim from one of Colorado, which had been construed by the supreme court of that state in accordance with one of the contentions of the petitioner before it was adopted by Arizona. Nevertheless after calling attention to these facts this Court said:

> "On the other hand, while this court cannot refuse to exercise its own judgment, it naturally will lean toward the interpretation of a local statute adopted by the local court (*Sweeney v. Lomme*, 22 Wall., 208; *Northern Pacific R. R. Co. v. Hambly*, 154 U. S., 349, 361; *Fox v. Haarstick*, 156 U. S., 674, 679). And again, when for a considerable time a statute notoriously has received a construction in practice from those whose duty it is to carry it out, and afterwards is re-enacted in the same words, it may be presumed that the construction is satisfactory to the legislature, unless plainly erroneous, since otherwise naturally the words would have been changed (*New York, New Haven & Hartford R. R. Co. v. Interstate Commerce Commission*, 200 U. S., 361, 401, 402). The statute of Arizona was re-enacted in 1901 and was said by the Supreme Court to have been construed by the Board against the petitioner's contention ever since the Board was created, eighteen years before. Even apart from the re-enactment a certain weight attaches to this fact. *United States vs. Finnell*, 185 U. S., 236, 243, 244. *United States vs. Sweet*, 189 U. S., 471. The presumption that the codifiers of 1901 knew and approved the practice of the Board certainly is as strong as the presumption that the original enactors of the statute knew a single decision in another State; and it is more important since it refers to a later time" (206 U. S., 479).

The board of general appraisers dismisses the argument based upon departmental construction with the contention that it conflicts with judicial interpretation in the Russian sugar bounty case, to which reference will hereafter be made, though it concedes that in one respect at least the case at bar differs radically from that case (R., 21). Moreover, the question of long continued executive practice based upon departmental construction did not arise in the Russian sugar bounty case.

To sum up this branch of the case in a few words, the allowance on British spirits dates from 1860. The *general* bounty provision was first inserted in the Tariff Act of 1897. From that date until 1914, for a period of 17 years, the departmental practice was consistent in viewing this allowance, not as a bounty, or grant within the meaning of our tariff laws, though on two occasions as the record shows, to wit, in 1904 and again in 1910, attention was officially drawn to the statutes of Great Britain bearing upon the subject. Meanwhile two tariff laws were reenacted, the one in 1909 following the consular despatch of 1904, and the other one in 1913 following the consular despatches in 1910, and the departmental ruling of April 18, 1911. A stronger case for the application of the doctrine flowing from a long-continued and uniform practice, and legislative reenactment in the face of that practice, could hardly be found.

II. A countervailing duty is assessed upon British spirits upon the theory that Great Britain pays or bestows a bounty or grant upon their exportation, whereas in fact not all British spirits when exported get the allowance; only those which are warehoused in a certain specified way get it. Furthermore, the allowance is also paid when certain British spirits go into domestic consumption.

Ever since the passage of the original law of 1860, there has been a progressive purpose manifest to confine the excise

tax to such spirits as go into domestic *potable* consumption. All spirits not so destined, whether shipped abroad or used at home, escape the tax and, in harmony with the policy of the law, all such spirits not only escape the tax but get the allowance, thus demonstrating that the allowance is not in the nature of a bounty on exportation, but is solely a compensation for extra costs of manufacture which the distiller has to incur by reason of a complicated tax machinery designed to affect only such British spirits as are potably consumed at home. Allowances are paid :

(a) When compounded spirits are "used in a customs warehouse for fortifying wines or for any other purpose to which foreign or colonial spirits may be applied under the laws or regulations of the customs" (See Section 12 of Chapter 98 of 28 and 29 Vict., 1865).

(b) When British spirits are used in the United Kingdom for industrial purposes (See Section 8 of the Finance Act, 1902, and Section 1 of the Revenue Act, 1906).

Finance Act of 1902 :

> "8. (1) Where, in the case of any art or manufacture carried on by any person in which the use of spirits is required, it shall be proved to the satisfaction of the Commissioners of Inland Revenue that the use of methylated spirits is unsuitable or detrimental, they may, if they think fit, authorize that person to receive spirits without payment of duty for use in the art or manufacture upon giving security to their satisfaction that he will use the spirits in the art or manufacture, and for no other purpose, and the spirits so used shall be exempt from duty :
>
> "Provided that foreign spirits may not be so received or used until the difference between the duty of customs chargeable thereon and the duty of excise chargeable on British spirits has been paid."
>
> 2nd Ed., VII., Cap. 7 ; Exhibit 1, h., R., 14.

Revenue Act of 1906:

> "1. (1) Where any spirits are used by an authorized methylator for making industrial methylated spirits, or are received by any person for use in any art or manufacture under section eight of the Finance Act, 1902, the like allowance shall be paid to the authorized methylator or to the person by whom the spirits are received, as the case may be, in respect of those spirits as is payable on the exportation of plain British spirits, and the Commissioners may by regulations prescribe the time and manner of the payment of the allowance and the proofs to be given that the spirits have been or are to be used as aforesaid."
>
> 6th Ed., VII., Cap. 20, Ex. 1, i., R., 14.

> "'Methylate' means to mix spirits with some substance in such manner as to render the mixture unfit for use as a beverage, and 'methylated spirits' means spirits so mixed to the satisfaction of the Commissioners."
>
> Spirits Act, 1880, Sec. 3.

(c) British spirits for use, duty free, at universities and colleges, etc. The statutes just quoted as held to authorize the payment of the allowances in the case of such spirits (See G. O. 20/06, cited in Ham's Year Book, Exhibit 2 for identification, page 165).

(d) British spirits when used as naval or ship's stores (See G. O. No. 6, 1887, cited in the Imperial Tariff, Exhibit No. 4 for identification, page 105).

It is of course not accurate to say, as the board does (R., 19) that if spirits are "sold for consumption in Great Britain, they are burdened with the excise tax." It is only when sold for *potable* consumption that they are so burdened. Indeed, the board recognizes this by saying later on (R., 21):

> "In the case at bar a part of the spirits that are not exported are also relieved from the excise tax, and

some also receive the allowance made to spirits exported. The record is not entirely clear as to what proportion this is of the whole domestic consumption of spirits of this character. It is quite apparent, however, that it is a *very small proportion*, and the fact remains, *which in our judgment is the controlling fact*, that the *very large part* of the spirits of the class here under consideration that are sold to be consumed in Great Britain has to pay the excise tax, and that that which is exported does not, and, in addition thereto, receives the allowance heretofore stated." (Italics ours).

The authority for this view is not disclosed. It carries its own refutation. Obviously, the quantity of spirits used by a country like Great Britain for what may be broadly termed industrial purposes, must be something more than "a very small proportion" of the whole domestic consumption. It must be true that a very substantial proportion of the spirits which go into home consumption not only escape the excise tax altogether, but also get the very same allowance for which we here contend.

Not all British spirits when exported get the allowance. The following different kinds of warehouses are defined in Section 3 of the Spirits Act of 1880 :

> " ' Distiller's warehouse ' means an approved warehouse on the premises of a distiller.
>
> " ' Excise warehouse ' means a warehouse approved or provided by the Commissioners as a general warehouse for the deposit of spirits.
>
> " ' Customs warehouse ' means a warehouse approved or provided by the Commissioners of Customs for the deposit of spirits."
>
> Spirits Act, 1880, Sec. III.

See, also, in this connection Sections 49, 50 and 54, Spirits Act of 1880. In addition to this, by Section 13 of the same Act a distiller's Spirit Store, is made mandatory :

> " 13. (1) Every distiller must, to the satisfaction of the Commissioners, provide a spirit store and cause it to be properly secured.
>
> " (2) The spirit store must be kept locked by the officer in charge of the distillery at all times except when he is in attendance."

We have, therefore, (1) a distiller's warehouse ; (2) an excise general warehouse ; (3) a customs or crown excise warehouse ; (4) a distiller's spirit store. It is obvious that spirits may be exported from a distiller's warehouse or from a spirit store. It is expressly provided that they may be exported from a distiller's warehouse (See Section 81, Spirits Act, 1880). But the allowances are only paid when the spirits are exported from an *excise or customs warehouse* (See Section 3, Act of 1885, heretofore cited). Manifestly, the mere act of exportation does not entitle the distiller or shipper to the allowance. He must route his spirits through one of two prescribed warehouses if he desires to obtain it. The allowance, therefore, may or may not be extended to spirits when exported.

III. These allowances are not bounties or grants in their origin and purpose.

When the question as to whether these allowances did or did not constitute a bounty or grant was the subject of investigation by our Government in 1911, Ambassador Bryce transmitted to Secretary of State Knox a report of the British board of customs and excise in which it is stated (Exhibit 6, Annex A, R., 28) :

> " These allowances have formed an essential feature of our system of taxing spirits ever since 1860, when, in

consequence of the Cobden treaty with France, the former protective duties were abolished. It is a significant fact that the adoption of the allowances as part of our fixed system, so far from being associated with any idea of a bounty, took place at the very time when free-trade principles secured the most complete acceptance in this country.

"The object of the allowances originally was, and still is, not to place the manufacturer of British spirits in a position of advantage, as compared with his foreign competitor in the foreign market, but to prevent him from being placed in a position of disadvantage in that market as a result of the expenditure which his own Government, for its own ends, forces him to incur in the process of manufacture.

"The duty on British spirits is very heavy, and involves the necessity of special precautions being taken to prevent any spirit escaping the duty. These precautions include the imposition upon the manufacturer of a number of statutory requirements and restrictions in connection with his plant and methods of manufacture, which considerably increase the cost of manufacture. The allowances on exportation are intended to be an equivalent and no more than an equivalent of this extra cost.

"This object has been kept in view in fixing the actual amount of the allowances."

In commenting on this Mr. Bryce said (Exhibit 5, R., 23):

"So far from these allowances being intended to protect or foster a domestic industry in order to strengthen it against competition abroad they owe their origin to the adoption by Great Britain of free trade principles. The necessity of raising revenue otherwise than by import duties of a protective character made a heavy excise upon spirits indispensable and that in turn caused the establishment of a complicated structure of fiscal regulations and administrative processes for the distilling industry. An excise has the highest

> cost of production in proportion to the return of any tax—and this cost of collection greatly adds to the expense of carrying on the industry. As compensation for the heavy pressure of the excise and because spirits are articles whose large consumption it is not desired to encourage, the industry is accorded in the home markets a fair chance with foreign producers by an import duty, which restores the balance as between the home and the foreign distiller and on export to foreign markets is allowed a drawback for the loss and hindrance to which the exported product has been subjected together with that for home consumption."

It is evident that Parliament from the start was not voting any bounty or allowance to the British distiller, but merely an *allowance*—to quote the language of the Act of 1860—" in consideration of the loss and hindrance caused by the excise regulations " to the distiller in the conduct of his business. What the distiller got was not a bonus but *compensation* for the extra expenses which he incurred. In a statement submitted by the board of customs and excise and transmitted by the British Ambassador to the State Department in 1911 (Exhibit 6, Annex A, R., 29) it is said :

> " The allowances were originally fixed by Mr. Gladstone in 1860 after prolonged consultation between the Revenue Authorities and the traders affected. The traders were required to formulate their claims in the fullest detail, stating what restrictions in their opinion increased the cost of manufacture and the exact amount of extra cost attributable to each ; every item was closely criticised by the Revenue Authorities, some being disallowed altogether, and others allowed in a whole or in part ; with the result that the allowances were fixed at a figure which the Revenue authorities accepted as not exceeding the loss caused by revenue restrictions. In the period since 1860 the rates have been on more than one occasion modified as necessity arose, but the same object, as above described, has been

kept in view, and the same procedure followed in order to arrive at the exact rates to be allowed."

An official summary of what these allowances are based on will be found in the statement submitted by the British Ambassador to to the State Department in 1911 (Exhibit 6, Annex D, R., 35), to wit:

> " Allowance of 3d. on Plain Spirits.
>
> This allowance is given in respect of the various restrictions imposed by the law upon distillers, of which the following are the most important:
>
> (1) The prohibition against brewing and distilling at the same time;
>
> (2) The prohibition against mixing worts while in the process of fermentation;
>
> (3) The compulsory stoppage of work on Sundays;
>
> (4) The restrictions on the manufacture of yeast.
>
> We are satisfied that at the present time the cost thrown upon the distiller by these restrictions is not less than the 3d. allowed.
>
> " Allowance of 5d. on Compounded Spirits.
>
> " Rectifiers and compounders, *i. e.*, manufacturers of British compounded spirits (*e. g.*, gin, sloe gin, orange bitters, and British liquers), work under this further statutory disability that their business must be carried on apart from a distillery and the compounds must be manufactured from spirits on which the duty has been paid. This restriction increases the costs of manufacture by at least 2d. per gallon. An allowance of 5d. per gallon is therefore paid on the exportation of British compounded spirits of which 3d. is payable in respect of the restrictions at the distillery, which have enhanced the price of the spirits as purchased, and the remaining 2d. in respect of the restrictions imposed on the rectifier."

Just how these restrictions operate can be seen by reference to the sworn statements of distillers submitted by the British Ambassador in 1911, some of which statements have

been incorporated in this record. Here is a brief summary of what they establish: James Buchanan, chairman of James Buchanan & Co.; Thomas R. Dewar, Managing Director of John Dewar & Sons Company; Peter J. Mackie, Chairman of Mackie & Co., and George P. Walker, Chairman of John Walker & Sons, Ltd., all distillers of well-known brands of Scotch Whisky, united in making this statement:

> "these restrictions include: *e. g.*, the condition that the mashing and distilling processes must be carried on at separate times, thereby causing one-half of the plant to remain idle, *whereas in Continental Distilleries these processes can be carried on simultaneously and continuously, even during Sundays. The result of this restriction is, by comparison, to reduce the production of the British distiller, employing similar plant, by one-half or two-thirds.*
>
> "That the regulations governing the equipment of distilleries, warehouses and housing accommodation for revenue officers are exceedingly onerous in their requirements of capital outlay and that the drawback in question has been, and is, admittedly given as some recompense therefor."
>
> Ex. 6, Annex E, R., 37.

Alexander John Cameron, Secretary to John Dewar & Sons, Ltd., stated that:

> "the allowance made to us by the Treasury of the British Government on whisky exported to foreign countries and amounting to three pence per Imperial proof gallon as tested by Sykes' hydrometer does not adequately reimburse or cover us for the extra expense and outlay incurred by us in the manufacture of whisky by reason of the many restrictions and restraints put upon us by the British Excise Regulations such as—
>
> (*a*) Separation of periods in distillation, thus involving idleness of half our plant which would be obviated did such restrictions not exist.

(*b*) The prohibition of Sunday work.

(*c*) Interest on capital thus sterilized.

(*d*) Various other minor restrictions which all tend to increase the cost of production."

Ex. 6, Annex E, R., 38.

John Charles Calder, Managing Director of James Calder Co., made a statement more in the way of an argument, but is opinion nevertheless carries weight. He says :

"I consider the rebate of three pence per proof gallon, allowed to us by the excise authorities in this country on the exportation of British whiskies, is not sufficient to cover the actual loss of producing the whisky on account of the excise regulations. These regulations are so many and so varied that it is impossible to enumerate them in detail, but I have repeatedly made application and discussed the matter with the excise authorities asking for an increase of this rebate as it was not sufficient, and pointing out the reasons why I consider it too small, but have never been successful in getting it increased, as our excise authorities said to me that the revenue was so much needed that there was no chance of getting anything extra, and it is proof positive that this allowance is not a bounty, but an allowance on account of the extra cost, simply and solely that it is allowed, as, otherwise, the government would never grant us this money as there is no industry to which they pay less consideration."

Ex. 6, Annex E, R., 39.

Peter Dawson, referred to as one of the largest Scottish stillers, has this to say :

"The distillers and producers of spirits in Great Britain are required by the internal revenue law to close down their business on Saturday night at twelve o'clock, thus compelling all fires to go cold and requiring the reheating of all mash, kettles, stills, etc., etc., Monday morning of every week. * * *

"Separate and distinct records must be kept in particular books and in a particular manner regarding every mash and all the liquor produced therefrom subject to the inspection of the government officials at all times, and report must be made concerning the business of distilling required from time to time to the government. * * *

"It is to be remembered that the requirement of the law forbidding the conduct of business from midnight on Saturday until one o'clock Monday morning applies solely to the distillation of British spirits, while all other manufacturing businesses are permitted to continue steadily from month-end to month-end, or from year's-end to year's-end, with no legal restriction whatsoever.

"It must further be noted during the period of time from Monday morning at one o'clock to Saturday night at twelve o'clock the business of distilling is conducted under the immediate eye of the excise officials, but that the hours are limited daily from nine o'clock to four o'clock, and (if) it becomes necessary to pay an extra fee for the two hours additional attendance on the part of the Government officers."

Exh. 11, R., 48, 49.

The despatch of the U. S. consul at Edinburgh, dated August 5, 1913, is doubtless, as we have already noted, responsible for the decision of the Treasury department to impose a countervailing duty in 1914 after having decided not to impose it following its thorough investigation in 1911. The argument of the consul in the despatch just mentioned runs thus (R., 42):

"Spirits to be exported and spirits to be entered for domestic consumption are taken from *the same vat.* The contention of exporters of whisky that the allowance of three pence per proof gallon is of the nature of a 'drawback' for extra expense imposed by the excise restrictions upon that business, has no validity. The additional labor cost or other cost to *blenders and bottlers* involved in the excise restrictions is trifling, in-

asmuch as fully four-fifths of the spirits to be entered for home consumption are blended and bottled in bond by the same employees who blend and bottle spirits to be exported and under exactly the same conditions. Any increased cost on account of excise restrictions is more than counterbalanced by the saving effected by bottling, etc., in bond. In the processes of blending and bottling and of casing and barreling spirits, there is a certain amount of waste, especially due to the breaking of bottles or other containers. In bond, the loss by this waste of spirits is comparatively small, as no tax has been paid on the spirits. On every gallon wasted in bond by the bursting of bottles, etc.,—the loss is from 2/6 (61 cents) to 5/- ($1.21), whereas on every gallon of tax-paid spirits wasted the loss is from 17/3 ($4.19) to 19/9 ($4.80). Obviously, it is economical to blend and bottle spirits in bond for domestic consumption as well as for export; and it is obvious also that the allowance on the exportation of spirits is purely a grant of bounty. This allowance is so regarded here by all users of neutral spirits (manufacturing chemists and others), by dealers in wines, and by dealers in whisky who are not exporters."

This statement is in the main irrelevant and misleading. The additional cost to blenders and bottlers resulting from the excise restriction is very likely trifling, as he says, but this is beside the point. Complete answer to the consul's argument is found in the despatch of the British Ambassador to the Secretary of State of date May 1, 1914 (Exhibit 9, R., 43):

> "After careful consideration of this despatch His Majesty's Government feel convinced that the United States consul is under a misapprehension as to the facts of the case. He maintained that the allowance is of the nature of a grant or bounty, and not merely a drawback, because British spirits for export and for home consumption are taken from the same vat and are branded and bottled in bond; and that therefore the trifling extra cost imposed by the excise regulations is

more than counterbalanced by the saving of the amount of the tax, on such spirits as are wasted by the breaking of bottles in the process of bottling and blending in bond. This argument rests upon the erroneous assumption that the exporter received the allowance as compensation for extra expense caused to him by the excise regulations governing the *blending and bottling* operations in bonded warehouses. But these regulations have no bearing upon the question at issue. The allowance of 3d. in the case of plain spirits is granted solely on account of statutory restrictions on the actual *brewing and distilling* which increase the cost of production to the distiller; the allowance of 5d. in the case of compounded spirits is made up of 3d. payable in respect of the above mentioned restrictions at the distillery and 2d. extra on account of the further statutory disability that the work of rectifying and compounding must be carried on apart from a distillery and the compounds must be manufactured from spirits which have already paid duty. The regulations under which the subsequent operations of vatting, blending and bottling are carried in bonded warehouses are not, and never have been considered in connection with the export allowance. * * *

" With reference to the statement contained in the consul's despatch to the effect that ' British users of neutral spirits (manufacturing chemists and others) dealers in wines and dealers in whisky, who are not exporters regard the allowance as a bounty,' His Majesty's Government doubt whether this view is widely prevalent. They point out, however, that these classes of traders have no interest in the matter and probably few have any knowledge of the nature and reasons of the allowance."

To the same effect, see the statement of the Commissioners of Customs and Excise, dated 18th of April, 1914 (Exhibit 10, R., 47):

" The view of the consul that there is no justification for the grant of allowance on the exportation of British spirits and that payment of such allowance is

> ' purely a grant or bounty,' appears to be based upon a complete misconception of the facts of the case."

Statement is made by the chairman of the Scottish Whisky Exporters' Association (Exhibit 11, R., 50) that the conclusions of the consul " are based on inaccurate knowledge of the true facts." Some corroboration that the consul's investigations, if not superficial were at least not thorough, is found in the statement in his despatch of April 28, 1910 (Exhibit 7, R., 40), that " the terms of the *original* law granting an allowance on the exportation of whiskey, etc., are found in the Customs and Inland Revenue Act of 1885." The original law, as we have seen, goes back to 1860.

The nature of the extra charges, directly traceable to the excise regulations for which the British government seeks to remunerate the distiller when his output is not destined to be used as potable spirits in domestic consumption, is thus made plain from the foregoing analysis of the record. It is evident that from Gladstone's time down to the present, British government officials have conducted exhaustive investigations to approximate the amount of these extra charges. It appears that the distillers have been required to formulate their claims in the fullest detail and every time has been closely criticized by the revenue authorities with the result that the allowances are fixed at a figure which these authorities accept as not exceeding the loss called by these revenue restrictions (Exhibit 6, Annex A, R., 28 ; Exhibit 6, Annex D, R., 35). It further appears that the distillers, as is shown by the statements of Nicholson, Dawson and others, have from time to time energetically represented that these allowances are inadequate (Exhibit 6, Annex E, R., 36, 38, 39 ; Exhibit 11, R., 48). It is evident finally from the record that this is virtually recognized by the British government. The British Ambassador in his statement of the British case in 1911 asserted (Exhibit 6, R., 32), that :

> " the allowances do not even compensate the losses they are intended to reimburse, as is abundantly proved."

By way of summary on this branch of the case, we quote the following:

> "The internal revenue law of Great Britain, imposes a tax upon all spirits produced for potable purposes, but since all distillers produce spirits for both potable purposes and for methylating for commercial use, as well as for export, it becomes necessary that the tax should be estimated upon the entire amount of production although paid only upon the goods manufactured for domestic potable use. It thus appears that the expense incident to full obedience with the internal revenue law applied to all liquor distilled whether the same subsequently is sold for methylated commercial purpose or is exported, and as this expense is very considerable, the government has, for more than fifty years, made an allowance per gallon to the distiller upon so much of his product as is turned into methylated commercial channels, or, being potable, is exported from the country" (Dawson's statement, Exhibit 11, R., 48).

> "No one has ever suggested that the blender and bottler of British spirits for export is hampered with any restrictions which do not equally apply to spirits consumed in this country. What we do say is that the whole operations of distillers in this country, whether the spirits are destined for home or export, are carried on under restrictions which are deemed necessary to protect the large revenue derived from their product. *In the case of spirits consumed in this country the extra costs entailed may be regarded as an addition to the duty which is collected in cash, and as between distillers at home no one received a preference over the other.*"
>
> (Statement of the Scottish Whisky Exporters Association, Exhibit 11, R., 50).

These extra costs, which are incontestably proved actually to exist and which the allowonces are designed to cover, are in reality, when analyzed, in the nature of an *additional excise*

tax upon the distiller. With this fact established our problem is simplified. Our inquiry must now be directed to ascertain whether the act of compensating distillers for these extra costs, constitutes directly or indirectly the paying of a bounty or grant. The answer to this question involves a consideration of:

IV. The Legal Nature of a Bounty or Grant within the Meaning and Scope of the existing Tariff Law.

But little reflection is needed to demonstrate that the phrase " bounty or grant " as used in Section 4, Paragraph E of the present law is of limited scope and application. The phrase cannot be possibly used in its most comprehensive sense. There is a wide difference between an indirect bounty and indirectly paying a bounty. The statute does not provide for an indirect bounty. To illustrate, there is an age-worn controversy as to whether a protective tariff in effect operates to bestow a bounty upon the domestic manufacturer. The controversy is more or less political in character, but it would not be difficult to find considerable support in the writings of many political economists for the proposition that a protective tariff confers an indirect bounty upon its beneficiaries. Even Alexander Hamilton in his widely quoted " Report of Manufactures " communicated by him as Secretary of the Treasury to the House of Representatives on December 5, 1791, said, under the caption of " Protective Duties " :

> " Duties of this nature evidently amount to a virtual bounty on the domestic fabrics ; since by enhancing the charges on foreign articles, they enable the national manufacturers to undersell all their foreign competitors " (Lodge's Works of Hamilton, Ed. 1885, Vol. III., p. 364).

And yet nobody would pretend that *legally* a protective duty fell within the bounties or grants penalized by Congress. Indeed, Hamilton himself had a very clear conception of the scope of the term bounty as it is ordinarily used in tariff matters in common speech, as we shall presently point out.

Section 4, Paragraph O, of the Tariff Act of 1913 (38 Stat., 114), provides:

> "That upon the exportation of articles manufactured or produced in the United States by the use of imported merchandise or materials upon which customs duties have been paid, the full amount of such duties paid upon the quantity of materials used in the manufacture or production of the exported product shall be refunded as drawback, less one per centum of such duties."

This is known as the drawback section of the law and the Treasury Decisions weekly are filled with the granting of *allowances* on account of drawback. The original drawback provisions is found in Section 3 of the first tariff act of July 4, 1789 (1 U. S. Stat., 27.) The first distinctive internal revenue act passed by Congress on March 3, 1791 (1 Stat, 199), contained this provision.

> "Allowance to Exporters.
>
> "And for the encouragement of the export trade of the United States.
>
> "SEC. 51. Be it further enacted, that if any of the said spirits (whereupon any of the duties imposed by this act shall have been paid or secured to be paid) shall, after the last day of June next, be exported from the United States to any foreign port or place, there shall be an allowance to the exporter or exporters thereof, by way of drawback, equal to the duties thereupon, according to the rates in each case by this act imposed, deducting therefrom half a cent per gallon, and adding to the *allowance* upon spirits distilled within the United

States, from *molasses*, which shall be so exported, three cents per gallon, *as an equivalent for the duty laid upon molasses by the said act*, making further provision for the payment of the debts of the United States: Provided always, That the said allowance shall not be made, unless the said exporter or exporters shall observe the regulations hereinafter prescribed: And provided further, That nothing herein contained shall be construed to alter the provisions in the said former act, concerning drawbacks or allowances, in nature thereof, upon spirits imported prior to the first day of July next."

Section 52 deals with "Proceedings to obtain drawback or *allowance* on exportation." The then existing duty on molasses was 2½ cents per gallon (See section 1, act of July 4, 1789). The drawback on spirits distilled from molasses was increased by Section 5 of the Act of March 3, 1797 (1st U. S. Stat., 503) and still further increased by Section 5 of the Act of May 13, 1800 (2 U. S. Stat., 84).

Early provision was made for drawbacks upon refined sugar. Section 6 of the Act of April 30, 1816 (3 U. S. Stat., 340), is typical of this sort of legislation:

"SEC. 6. And be it further enacted, That in addition to the duty at present authorized to be drawn back on sugar refined within the United States, and exported therefrom, there may hereafter be drawn back on such refined sugar, when made out of sugar imported into the United States, the further sum of four cents per pound without deduction, which shall be allowed under the same provisions with the duty now permitted to be drawn back; and, furthermore, on the express condition that the person exporting the same shall swear, or affirm that the same, according to his belief, was made out of sugar imported from a foreign port or place; which oath or affirmation, in case the collector of the customs shall not be satisfied therewith, shall be supported by the certificate of a reputable refiner of sugar to the same effect, and that the drawback on refined sugar hereto-

> fore imported, be allowed subject to the regulations applicable to the drawback of duties on other imported articles."

Almost coincident with the passage of this law Congress enacted a duty of three cents a pound on raw sugar (See section 6, tariff act of April 27, 1816, 3 U. S. Stat., 312).

Under Schedule I. of the Act of July 30, 1846, exempting certain articles from duty is found this language :

> "Goods, wares and merchandise, the growth, produce, or manufacture, of the United States, exported to a foreign country and brought back to the United States in the same condition as when exported, upon which *no drawback or bounty has been allowed.*"
>
> 9 U. S. Stat., 49.

Allowances or drawbacks have thus been a part of the fiscal policy of the United States from the first. They are granted on exportation and sometimes, as in the case of the allowance upon spirits distilled from molasses and refined sugar made from raw sugar, the allowance has been *flat* and only approximating the import duties upon molasses and raw sugar. Nobody has ever conceived, however, that such drawbacks or allowances were for this reason in the nature of bounties as that term is used in Paragraph E of our existing tariff law and this is true in spite of the fact that the word "bounty" was used in connection with the term "drawback" in the Act of 1846 just quoted. It is safe to say that our Government would be quick to controvert any contention that such a drawback constituted a bounty or grant within the meaning of our existing law and would vigorously protest any attempt of a foreign government to penalize it as such. And yet it is relatively easy to marshal considerable argument in support of the contention that a drawback is an indirect bounty.

A brief allusion to our legislative history in connection with the New England fisheries is interesting in this connec-

tion. By section 4 of the act of July 4, 1789 (1 U. S. Stat., 27) it was provided :

> "SEC. 4. And be it (further) enacted by the authority aforesaid, That there shall be allowed and paid on every quintal of dried, and on every barrel of pickled fish, of the fisheries of the United States, and on every barrel of salted provision of the United States, exported to any country without the limits thereof, in lieu of a drawback of the duties imposed on the importation of the salt employed and expended therein, viz :
>
> On every quintal of dried fish, five cents.
> On every barrel of pickled fish, five cents.
> On every barrel of salted provision, five cents."

This is another instance of the familiar allowance in lieu of drawback and as an equivalent for duties paid. Subsequently the law of February 16, 1792 was passed (1 U. S. Stat., 229) Section 1 provided :

> " SEC. 1. Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the allowance now made upon the exportation of dried fish of the fisheries of the United States, in lieu of a drawback of the duties paid on the salt used in preserving the same, shall cease on all dried fish exported after the tenth day of June next, and as a commutation and equivalent therefor, there shall be afterwards paid on the last day of December annually, to the owner of every vessel or his agent, etc. * * * Provided, That the allowance aforesaid on any one vessel, for one season, shall not exceed one hundred and seventy dollars."

A most interesting discussion ensued in the House on the passage of this bill. The debate was voluminous and we can only cite one or two extracts which are specially in point. Elbridge Gerry said (Annals of Congress, 2nd Congress, 1st session, pp. 375 *et al.*) :

> " The proposed allowance has been called a bounty on occupation, and is said to be very different from that

encouragement, which is the incidental result of a general commercial system ; but in reality it is no bounty ; a bounty is a grant, made without any consideration whatever, as an equivalent ; and I have no idea of a bounty, which admits of receiving from the person, on whom it is conferred, the amount of what is granted. We have imposed a duty on salt, and thereby draw a certain sum of money from the fishermen ; the drawback is in all instances, the amount of the money received ; this is all we ask ; and we ask it for a set of men who are as well entitled to the regard of Government as any other class of citizens.

" It has been supposed, that the allowance, made to the fishermen, will amount to a greater sum than the drawback on the exportation of the fish ; but I think it has been clearly shown that this will not be the case ; on the contrary, it is presumable, that the drawback on the fish would on the whole exceed the sum which is proposed to be allowed to the fishermen ; sometimes it might be more, sometimes less. The calculation is made on general principles ; and it is impossible to calculate to a single cent ; the quantity of salt to be expended on the fish, cannot be minutely ascertained ; but this was not heretofore considered as a sufficient reason why Congress should refuse to allow the drawback ; they allowed it, though in a different shape. It is now proposed to make a further commutation ; gentlemen call this a bounty on occupation ; but is there any proposition made for paying to the fishermen, or other persons concerned in the fishery, any sums which we have not previously received from them ? If this were the case, it would indeed be a bounty ; but if we beforehand receive from them as much as the allowance amounts to, there is no bounty granted at all."

Mr. Madison said *(Ibid*, p. 386) :

" Let me premise, however, to the remarks which I shall briefly offer, on the doctrine maintained by these gentlemen, that I make a material distinction in the

present case, between an allowance as a mere commutation and modification of a drawback, and an allowance in the nature of a real and positive bounty. I make a distinction also, as a subject of fair consideration at least, between a bounty granted under the particular terms in the constitution, 'a power to regulate trade,' and one granted under the indefinite terms which have been cited as authority on this occasion. I think, however, that the term 'bounty,' is in every point of view improper as it is here applied. not only because it may be offensive to some, and in the opinion of others carries a dangerous implication, but also because it does not express the true intention of the bill, as avowed, and advocated by its patrons themselves. For if, in the allowance, nothing more is proposed than a mere reimbursement of the sum advanced, it is only paying a debt; and when we pay a debt, we ought not to claim the merit of granting a bounty."

The bill as originally introduced provided: "That the bounty now allowed upon the exportation of dried fish of the fisheries of the United States, etc," and "* * * provided that the bounty to be allowed and paid on any vessel for one season shall not exceed $170." (Annals of Congress 2d Congress, page 362).

Bates in American Navigation devotes considerable space to this bill. He says (page 77 and 78):

"From its phraseology it was called the 'Fishing Bounty Bill.' It was denied that it was a *bounty* measure, simply one to continue the original law allowing a draw-back on the *salt* in salted fish exported, to insure that fishermen, and not exporters, got the benefits, and to regulate the employment of the fishermen. Lest its passage should be taken as sanctioning *the doctaine of bounties*, amendments were deemed necessary and were made. Then it passed the House by 38 to 21 and the Senate 23 to 4. As a Bounty Bill it would have been defeated."

The radical shift in this law of 1792 which required the allowance to be paid only to the owner of every vessel or his agent might conceivably raise some dispute as to whether the allowances made were or were not in fact bounties, but the argument that they were not bounties was apparently the view that prevailed by the votes of the members of the House. In any event the distinction thus early made by Madison and Gerry is the important thing to bear in mind.

Section 3329 of the Revised Statutes provides in detail that distillers of spirits may obtain export certificates in the nature of acquittance of internal revenue taxes—in other words, the internal revenue or excise tax is remitted on exportation. The remission of internal revenue taxes has never been construed to constitute a bounty. Unless such internal revenue tax were remitted on exportation, there might be indeed a question as to whether it would not amount to an export duty, which is prohibited by our Constitution.

These illustrations point to the irresistible deduction that the provision for a bounty or grant must be accorded some restricted meaning and that the whole spirit of the law requires the enforcement of distinction between a bounty on one side and a protective duty and a drawback or remission of tax on the other. All of these things may be said to be "grants" in the broad acceptation of that term, but obviously not all of them are the grants or bounties of the law.

The distinction here contended for, to wit, the common meaning given to the word "bounty" as differentiated from the word "drawback" in tariff parlance, is recognized by writers. Hamilton in his report of manufactures said:

> "But the greatest obstacle of all to the successful prosecution of a new branch of industry in a country in which it was before unknown, consists, as far as the instances apply, in the bounties, premiums and other aids which are granted, in a variety of cases, by the

nations in which the establishments to be imitated are previously introduced. It is well known (and particular examples, in the course of this report, will be cited) that certain nations grant bounties on the exportation of particular commodities, to enable their own workmen to undersell and supplant all competitors in the countries to which those commodities are sent. Hence the undertakers of a new manufacture have to contend, not only with the natural disadvantages of a new undertaking, but with the gratuities and remunerations which other governments bestow."

Lodge's Works of Hamilton, Ed. 1885, Vol. III., p. 328.

* * * * * *

"Where duties on the materials of manufacture are not laid for the purpose of preventing a competition with some domestic production, the same reasons which recommend, as a general rule, the exemption of those materials from duties, would recommend, as a like general rule, the allowance of drawbacks in favor of the manufacturer. Accordingly, such drawbacks are familiar in countries which systematically pursue the business of manufactures."

Ibid, Vol. III., p. 375.

Thus, at the very threshold of our national existence, Hamilton gave to the words here in controversy those shades of meaning which Congress must have had in mind in enacting Paragraph E and provisions *in pari materia*.

It is beyond dispute that Section 5 of the Act of 1897, the original prototype of Paragraph E was inserted with special reference to the sugar industry and to countervail the system of ingenious export sugar bounties which had been adopted by some of the countries of Continental Europe. When the bill was on its passage through the Senate Mr. Aldrich, who had it in charge, said on May 25, 1897 :

"In the tables I have submitted no allusion is made to the bounty provisions contained in both the Senate

and House proposals. The adoption of these or similar provisions for countervailing duties seems to be a necessity if we are to develop the beet-sugar industry in the United States. Otherwise it will be possible for any foreign country, by extension of its bounties, to neutralize entirely the effect of our protective duties."

Cong. Rec., Vol. 30, Part 2, p. 1231.

It is to be noted that Hamilton used the word "premium" as synonymous with or in the nature of a "bounty." So under the existing law a "grant" must be in the nature of a bounty. It might be called a "premium" or by any other name. What it may be called is secondary. It is the inherent character of the thing itself that we are concerned with. It is a bounty in effect?

A definition which leaves nothing to be desired in the way of clearness is cited *in part* by Mr. Chief Justice FULLER in the Passavant case, 169 U. S., page 23.

"*Drawback*, a term used in commerce to signify the remitting or paying back upon the exportation of a commodity of the duties previously paid on it.

"A drawback is a device resorted to for enabling a commodity affected by taxes to be exported and sold in the foreign market on the same terms as if it had not been taxed at all. It differs in this from a bounty, that the latter enables a commodity to be sold for *less* than its natural cost, whereas a drawback enables it to be sold exactly at its natural cost. Were it not for the system of drawbacks it would be impossible, unless when a country enjoyed some very peculiar facilities of production, to export any commodity that was more heavily taxed at home than abroad. But the drawback obviates this difficulty, and enables merchants to export commodities loaded at home with heavy duties, and to sell them in the foreign markets on the same terms as those fetched from countries where they are not taxed."

Wharton's Law Lexicon, 11th Ed., p. 302.

In definitions of bounties and drawbacks cited in the Government brief before the board these distinctions were recognized:

> "Ency. Brit., 11th Ed. (p. 551):
>
> "* * * The object of a drawback is to enable commodities which are subject to taxation to be exported and sold in a foreign country on the *same* terms as goods from countries where they are untaxed. *It differs from a bounty in that the latter enables commodities to be sold abroad at less than their cost price;* * * *"
>
> "Bouvier, Ed. 1914, 3rd Rev. (p. 940):
>
> "An allowance made by the government to merchants on the *re-exportation* of certain imported goods liable to duty which in some cases consists of the whole, in others of a part, of the duties which had been paid on importation. *Goods can thus be sold in a foreign market at their natural cost in the home market.*"
>
> "Black's Law Dict., Ed. 1891 (p. 397) (Referring to drawback):
>
> "*It differs in this from a bounty, that the latter enables a commodity to be sold for less than its natural cost, whereas a drawback enables it to be sold exactly at its natural cost.*"

Our learned adversary, both before the board and the court of customs appeals, rested upon the contention that we must direct our inquiry to ascertain whether there is any encouragement of exportation. If that can be spelled out, then he would impose a countervailing duty on the theory that a bounty had been paid. Now our elaborate drawback system is frankly framed to encourage exportation and to enable our manufacturers to enter the world's market unburdened by taxes either on their finished product or on the materials entering into their finished products—to put it in another way, to offer commodities which stand them in on their books at the natural cost of production. Such is the purpose of remission upon exportation of internal revenue or excise taxes.

Although it has been part of our national policy from the beginning to remit internal revenue tax upon exportation, which nobody contends is a bounty within the meaning of our tariff laws, it is interesting to note that the board found itself driven by the logic of its decision to make this statement in commenting upon the fact that the domestic excise tax of 14s. 9d. per gallon was not treated by the collector as constituting a bounty :

> " We are not entirely certain that this takes the excise tax out of the provision of Paragraph E, but as the question is not before us we leave it undecided " (R., 21).

The real question here is :
What is this thing inherently ? Does it partake of the nature of a bounty or drawback ? The idea of a drawback does not of necessity imply the refunding of duties already paid. In the case at bar the excise tax, as we have seen, is estimated upon the entire amount of production, although paid only upon goods manufactured for domestic potable use. The extra costs due to excise control in effect amount to nothing more nor less than an additional excise tax upon the distiller. If the government in relieving the distiller of this entire excise tax burden in the case of spirits not destined for domestic potable use may remit the tax if it has not actually been paid, it may compensate him for that part of it which has been actually incurred in the way of expense by reason of extra cost. There is no difference in effect here, unless the act of remission or compensation has placed the distiller in a position of advantage by enabling him to offer his spirits for less than his natural cost of production. If the distiller has only been relieved as a result of the operation of the British laws of certain tax costs, as in this case, then we say there has clearly been no bounty paid or bestowed. The whole transaction is in the nature of a drawback and nothing else.

Here then we have a distinction which was no doubt in the minds of Congress in enacting the law. The intention was to "counteract any government subsidy to a foreign industry such as would give it an artificial advantage in competition with American industry" (Exhibit 5, R., 25). As stated in the summary of the British case (Exhibit 6, Annex A, R., 32): "No prejudice to American industry from bounty fed competition results now or ever has resulted from these allowances." Instead of enabling British spirits to be sold for less than their natural cost, the proof is ample that these allowances are approximate remuneration (inadequate as the record shows) for losses and hindrances due to excise regulation. They represent extra costs in excess of the natural costs and the reimbursements merely enables British spirits to be sold in the foreign market on the same terms as if they had not been taxed at all. The whole object and aim of the British policy is neatly summarized in language attributed to Sir H. Primrose of the Inland Revenue:

> "Both the allowance and the surtax which date from 1860 aim at the same purpose, which is not to put the British producer of spirits in a position of advantage as compared with his foreign or colonial competitor, but to save him from being placed in a position of disadvantage."
>
> Exhibit 11, R., 51.

Tested in the light of these distinctions, which have been judicially recognized, the allowances of this case are not bounties or grants within the statute. In the case of *United States vs. Hills Bros.*, 107 Fed. Rep., 107, the circuit court of appeals did not hold that the mere remission of the excise tax by Holland constituted a bounty, but that an actual bounty on production paid by the Netherlands Government, which under the operation of its laws the producer retained upon exportation, did amount to a bounty and to this extent

ouly was a countervailing duty imposed. A clear statement of what the facts were is found in the circuit court decision which was reversed.

> "Holland lays an excise on sugar imported or raised for consumption, and gives a bounty for production. The producer is charged with the excise, and credited with the bounty by way of reduction. The bounty has been added to the regular duty upon this importation of sugar from that country, because the excise was remitted upon the exportation of it from that country, and so the bounty is said to be paid indirectly upon that exportation."
>
> 99 Fed. Rep., 425.

The circuit court of appeals did not agree with the reasoning of the court below, saying :

> "The circuit court held that the bounty paid by the Netherlands government is a bounty upon production, and not a bounty upon exportation of the sugar, directly or indirectly. In this conclusion we are unable to concur. Without quoting the precise text of the various provisions of the Dutch law, it may be stated that it imposes on sugar (such as is here concerned), whether produced in or imported into Holland, an excise tax of 27 florins per 100 kilos. A so-called 'deduction,' which concedelly is a bounty, or grant, or premium, is paid for the production of raw sugar of 2.50 florins per 100 kilos for the year in question, and for the production of refined sugar therefrom a further bounty of 0.34 florins per 100 kilos ; a total of 2.84 per 100 kilos. The amount of such premium or bounty is placed to the credit of the person to whom it is due in his excise account ; and it is provided that, if it 'should cause the credit to exceed the debit, the difference shall be paid to the manufacturer or refiner from the revenue from the excise of the year from which the deduction takes place.' In view of the great disparity between the bounty and the excise tax (there is a similar disparity for all kinds and grades

of sugar), it is quite evident that there can be no excess 'paid' from the government's revenues to any one who is liable for the excise tax. Finally, it is provided that sugar withdrawn for exportation to a foreign country, and actually exported, shall be exempt from the excise tax. That tax being thus eliminated from the debit side of the account, the manufacturer, or refiner receives from the government the excess of credit over debit, which is the precise amount of the bounty. Undoubtedly, this premium or 'deduction' is called a bounty on production, and is a bounty on production; but the other provisions of the law have the practical effect of making it, from the standpoint of other countries, a bounty on exportation."

107 Fed. Rep., pages 108, 109.

In *Downs vs. United States*, 187 U. S., 496 (the Russian Sugar Bounty case), it will be seen upon analysis that this Court did not hold that the remission of an excise tax on exported sugar constituted a bounty. There was an excise tax imposed upon the production of Russian sugar which was remitted in that case, but the amount of this excise tax was not added as a countervailing duty and the Government did not contend that it constituted a bounty. Neither did the Court so hold. The case is somewhat complicated and its meaning and scope is only apparent after careful reading. The facts were that the Russian Government annually determined the total quantity of domestic sugar needed for home consumption and controlled both the production and the price. A certain normal and fixed amount of production was allotted to each factory, called free sugar. The excessive production over the amount fixed for home consumption was proportioned or distributed among the factories, and was identified as some specified variety of reserve or surplus sugar. Sugar from these reserves could only find its way into the home market under ordinary conditions, except on the payment of a double excise tax which was practically prohibitive. The

effect was to encourage exportation of all reserve sugar. Upon exportation all excise taxes were remitted. Under the operation of a complicated system, certain assignment or transfer certificates were issued which enabled "free sugar" to be exported and an equivalent amount of "surplus sugar" to be substituted for it. The court said:

> "It is practically admitted in this case that a bounty equal to the value of these certificates is paid by the Russian Government, and the main argument of the petitioner is addressed to the proposition that this bounty is paid not upon exportation but upon production."

It was the value of these certificates and not the remission of the excise which was held to constitute a bounty.

The board concedes that "the method by which the Russian domestic tax was levied and collected *differed materially* from that of the British tax here under consideration" (R., 20); and that "the facts of the case at bar differ radically from those of the sugar bounty case" (R., 21).

V. Additional facts which show that these allowances are bona fide allowances and not bounties upon exportation.

If these allowances were true bounties upon exportation, if they were devices more or less covertly, or ingeniously contrived, whereby British distillers can sell their spirits in the markets of the world for less than their natural cost, thus underselling and supplanting all competitors in the countries to which such spirits are sent, the allowances which the Government here complains of would be strictly confined to exported spirits.

We have already seen that these allowances are not paid upon the exportation of all spirits, but only upon those which

go through certain specified warehouses. We have also seen that the allowances are paid: (1) When compounded spirits are used in a customs warehouse for fortifying wines, etc.; (2) When British spirits are consumed in the United Kingdom for industrial purposes; foreign spirits also when so used get this allowance under the administration of a law designed to keep them on a parity with British spirits, as we shall presently point out; (3) when they are used at universities and colleges, which is no doubt a subdivision of industrial use; (4) when used as naval or ship's stores.

The Treasury Department in its memorandum of 1911, holding that these allowances were not export bounties cited the Revenue Act of 1906, with reference to spirits for industrial uses, and says:

> "The effect of this act is clearly to indicate that the allowance is a bona fide allowance, as stated in the act of 1860, and is not in any sense an export bounty" (R., 46).

The importers' case successfully meets another test which strongly militates in their favor. If the British policy be, as is claimed, designed not to put the home producer of spirits in a position of advantage as compared with his foreign or colonial competitor, but to save him from being placed in a position of disadvantage, then we should expect the law to maintain the parity in the home as well as in the foreign market. *This is actually the case.* Spirits Act 1880, Sec. 123, Sub-section 5, provides:

> "Foreign spirits may not be used for methylation until the difference between the dutyof customs chargeable thereon and the duty of excise chargeable on British spirits has been paid."

If the allowances represent an additional excise tax, as is maintained, then the import duty on imported spirits

should, in order to maintain the parity, be the approximate equivalent of the real excise duty represented by the actual amount paid in cash to the Government, plus the amount of the allowances which are supposed to compensate for the extra costs due to the excise regulations. The excise duty on spirits distilled in the United Kingdom is 14s. 9d. per proof gallon (Imperial Tariff, Exhibit 4, for identification, page 33). The allowance on plain spirits, as we have seen, is 3d. This means that the excise duty burden on the distiller is 15s. on plain spirits. Dawson in his statement says (Exhibit 11, R., 49):

> "It is also a fact that all importations of potable liquor pay not only the internal revenue tax but an addition of four pence per gallon before the same may be released for the British market."

As we have seen, the distillers, pointing to this state of affairs, have sought to have the allowance increased to 4d. as more closely approximating the true amount of extra costs, but so far without success. The Treasury memorandum of April 17, 1911 (Exhibit 9, R., 45) enumerates this as one of the reasons why countervailing duty should not be assessed under the law of 1909, to-wit:

> "The fact that there is a greater amount of duty assessed per gallon upon imported spirits into Great Britain than there is assessed as excise upon domestic manufactured spirits in Great Britain, thus clearly indicating that the domestic distiller or rectifier is protected against competition at home; and not merely protected by the allowance in question against competition in his export trade."

It was alleged by the Government in the board brief that:

> "The inland revenue tax of Great Britain is 14/9; customs duty on imported liquor is 15/2. The difference, 5 pence, is in fact protection."

There is no doubt protection in the sense suggested by the Treasury memorandum of 1911—in pursuance of its policy Great Britain does protect the domestic distiller *both* in the home market and in the export trade to the extent that he is saved from being placed in a position of disadvantage so far as his competitors are concerned by the operation of law which remunerates him for certain established extra costs. Does our adversary mean to imply that this 5 pence protection, as he calls it, amounts to a bounty? Let us assume for purposes of illustration that Great Britain laid no excise tax whatever on potable spirits. There would be no occasion then to pay allowances on account of excise regulations. Suppose now Great Britain did impose a customs duty of 5 pence per proof gallon on imported spirits, would our adversary argue that this was tantamount to a bounty or grant, and hence should be countervailed under our statute? If he would not so argue, how can he maintain that this surtax, which an analysis of the British statutes demonstrates is imposed to maintain the parity between the British and foreign distiller, should in the case at bar be regarded as a bounty?

The Finance Act of 1902 and the Revenue Act of 1906, as well as the Spirits Act of 1880, afford a perfect illustration of our contention that these allowances do represent remuneration for the extra costs due to excise control. We reproduce Section 8 of the Finance Act of 1902:

> "8.—(1) Where, in the case of any art or manufacture carried on by any person in which the use of spirits is required, it shall be proved to the satisfaction of the Commissioners of Inland Revenue that the use of methylated spirits is unsuitable or detrimental, they may, if they think fit, authorize that person to receive spirits without payment of duty for use in the art or manufacture upon giving security to their satisfaction that he will use the spirits in the art or manufac-

ture, and for no other purpose, and the spirits so used shall be exempt from duty :

" Provided that foreign spirits may not be so received or used until the difference between the duty of customs chargeable thereon and the duty of excise chargeable on British spirits has been paid."

Bearing in mind that the word " spirits " means all spirits, whether British or foreign, and that the word " duty " means customs duty as well as excise or internal revenue duty, it is plain that both British and foreign spirits could under that provision be used for industrial purposes free of all duty, except that under the proviso foreign spirits when so used were chargeable with the difference between the customs duty and the excise duty. In other words, as we have seen, this difference approximately represented the amount of allowances paid on account of excise control and the imposition of this difference on foreign spirits was clearly designed to preserve the parity between foreign and domestic spirits in the home market. Here, as in the export trade, we see a reflection of the policy to save the British producer merely from being placed in a position of disadvantage. At that time there was no allowance paid when spirits were used for industrial purposes. This subsequently received the attention of an official Committee as appears from Exhibit 6, Annex B (R., 33), which we quote in full :

> " That something more is required in order to place spirit used as an instrument or material of manufacture on a footing satisfactory in a matter of cost. *Anything in the nature of a bounty is undesirable.* But seeing that on the price of spirit the very existence of certain industries may depend, and that for all industries using alcohol the price of the spirit is an important factor for that portion of trade that lies outside the home market, we are strongly of opinion that it is desirable to make such arrangements as will free the price of industrial

spirit from the enhancement due to the indirect influence of the spirit duties. It would surely be disastrous if, to the mischief that the drinking of alcohol causes by diminution in the efficiency of labour, the taxation of alcohol should be allowed to add the further mischief of narrowing the openings for the employment of labour.

"In our opinion, there is only one way in which the influence of the spirit duties can be satisfactorily counteracted in favor of industrial alcohol. To diminish the excise restrictions on the manufacture of alcohol might mitigate the influence, but probably not to any great extent. For with a duty of over 1000 per cent. on the prime cost of an article, revenue control must of necessity be strict. Moreover, the gain to industry would be made at the risk of the revenue, and a duty that yields over £20,000,000 per annum to the Exchequer is a public interest that cannot be trifled with. To relieve imported spirit from the surtax which is needed to counterbalance the burden imposed on production in this country by the excise regulations would be manifestly unfair; and its effect would be to give to the State aided spirits from Germany or Russia a practical monopoly of the market in this country for industrial spirit. *The only adequate course, it seems to us, is to neutralize, for industrial spirit, the enhanced cost of production due to excise control, in the same way as the enhanced cost is neutralized for exports, viz.: by granting an allowance on such spirit at such rate as may from time to time be taken as the equivalent of the increase in cost of production due to revenue restrictions.* At the present time, the rate is taken at 3d. per proof gallon for plain spirits, and the allowance would accordingly be at this rate, and *should be paid equally on all industrial spirit whether it be of British or of foreign origin.*"

The result was the allowance provided for in Section 1 of the Revenue Act of 1906, which applies to all industrial spirit whether it be of British or of foreign origin. Under the law and regulation, therefore, the effect is this: Foreign spirits

may be used for industrial purposes under conditions prescribed by the Commissioners of Inland Revenue upon paying the difference between the customs duty and the excise duty, to wit, virtually an amount representing the allowances. When the Commissioners of Inland Revenue get satisfactory proof that foreign spirits have actually been so used such spirits receive the allowances, just as British spirits get them under similar conditions. The result is the maintenance of that parity which is so clearly the policy of the British law. There is, to be sure, a slight difference between the amount collected by the government, which represents the difference between the customs duty and the excise duty, and the amount of the allowances which the government retains, but that is exactly comparable to the allowances made early in the history of our government on account of imported molasses and raw sugar. There could be no clearer demonstration of the real purpose of the British statutes governing allowances.

Conclusion.

Since the days of Hamilton this Government has remitted excise taxes upon exportation and, with interruptions, has pretty consistently adhered to the protective system. It is, therefore, not to be presumed that in penalizing bounties or grants by the imposition of countervailing duties Congress intended to condemn the very thing which it has fostered so continuously. If an exercise remission or drawback does not constitute a bounty under our laws and if, as seems clear from the authorities, the bounty or grant of the Tariff is something which tends to enable the producer to sell his product below the *natural* cost of production and thus derange the fiscal system of protectionist states, then *these* allowances clearly are not bounties or grants within the scope and meaning of

our law. Mr. Bryce went to the heart of this matter when he said to the State Department in 1911 (Exhibit 5, R., 24):

> "Drawbacks of duty accorded by protectionist states are not subjected to retaliatory measures and it is manifestly inequitable that an analogous allowance due, as has been shown to a preference for free trade over protectionist institutions should be singled out for penalty." * * *
>
> "To penalize these drawbacks (allowances) is therefore equivalent to penalizing the United Kingdom for its liberal treatment of and low duties on foreign imports. But for this free trade policy no high excise on spirits would have been required, no elaborate regulations embarrassing to production would have been established and no compensating allowances would have been paid" (R., 26).

The board says "the policy or *purpose* of the British law is not a subject with which we can deal" (R., 18) though a moment later on the same page of the opinion it says "we may with perfect propriety look to its *purpose*." This view of its functions is a trifle perplexing, but surely we must here determine whether these allowances are in fact bounties upon exportation, just as this Court in the Russian Sugar Bounty case scrutinized searchingly the intricate internal regulations of Russia, going so far as to examine the proceedings of the International Sugar Conference at Brussells, in order to pass upon the question whether the sugar certificates in that case did or did not constitute a bounty upon exportation. So here we must patiently analyze and dissect the real facts and in doing this, the history of the legislation, all the circumstances surrounding its enactment and the statutes themselves *in pari materia* may be profitably studied.

Wharton's Law Lexicon, 11th Edition (p. 129), *supra*, asserts that "Bounties have been entirely abolished in England, and the Sugar Convention Act, 1903, 3 Edw. 7, c. 21, has authorized restrictions upon the importation of bounty-fed

sugar into the United Kingdom." So the policies of Great Britain and the United States with respect to bounties are strikingly alike. The economic limitation of the term "bounty" must also be much the same. The United Kingdom no more pays or bestows a bounty or grant in the operation of its internal revenue system which calls for retaliation under the laws of the United States than the United States pays or bestows a bounty or grant under the operation of its internal revenue and protective tariff system. If Great Britain pays or bestows a bounty or grant in the narrow sense for which the Government here contends, then by the same test it must be conceded that the United States does likewise.

If it be proper to free goods from every form of excise tax so that they may enter the foreign market just as if no excise tax had been imposed at all, without incurring the penalty of our bounty statutes, then manifestly we have no concern with the amount of the excise tax, or what constitutes it. All this may very well vary in different countries according to the peculiar conditions and necessities of each country. Our inquiry is : Does the thing complained of, called in this instance an *allowance*, do anything more than put the product affected in the world's market free of all excise burden ?

It is respectfully submitted that it does not. The decision of the Court of Customs Appeals imposing a countervailing duty of three pence per gallon on plain spirits and five pence per gallon on compounded spirits should be reversed.

Respectfully submitted,

ALBERT H. WASHBURN,

Attorney for G. S. Nicholas & Co., *et al.*